

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

Comments of the Nebraska Rural Independent Companies

Dated: January 14, 2010

The Nebraska Rural Independent Companies

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SUMMARY

The Nebraska Rural Independent Telephone Companies (“Nebraska Companies”) appreciate the opportunity to submit comments in this rulemaking proceeding. In this filing, the Nebraska Companies urge the Commission to precisely define the terms “nondiscrimination” and “reasonable network management,” to consider universal service policy in the network neutrality discussion, and to augment and clarify the language of the proposed rules to identify the particular network management practices that must be disclosed to consumers.

The Nebraska Companies submit that the proposed definitions of “nondiscrimination” and “reasonable network management” do not provide clear guidance as to the practices that would be prohibited by network or broadband Internet access service providers. The Nebraska Companies recommend that the Commission adopt a standard that defines those practices that it would not consider reasonable and prohibit those practices in the rules. Furthermore, the Nebraska Companies suggest that if policies and rules related to reasonable network management force investment in expansion of network capacity rather than granular network management, the Commission must recognize the likely effect of such policy on the potential size of the high-cost universal service fund and adjust the fund size in order to meet the national goal of ubiquitous and affordable broadband access to the Internet.

Finally, the Nebraska Companies request that the Commission direct providers of broadband Internet access service to disclose any network management practices in use by the provider that may reasonably prevent, degrade or otherwise interfere with the user’s “consumer entitlements.”

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Comments of the Nebraska Rural Independent Companies

I. Introduction

The Nebraska Rural Independent Telephone Companies (“Nebraska Companies”)¹ hereby submit these comments in the above-captioned proceeding. These comments are provided in response to the Notice of Proposed Rulemaking (“NPRM” or “Notice”)² released on October 22, 2009. In prior comments filed with the Commission, the Nebraska Companies have recommended that the policy principles first articulated in the Commission’s 2005 *Policy Statement*³ be formalized through a rulemaking proceeding.⁴ For this reason, the Nebraska Companies appreciate the Commission’s efforts in this proceeding to ensure that access to the Internet remains open and robust. While the codification of the “consumer entitlements” of the *Policy Statement* into rules which broadband Internet access service providers must follow is

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K. & M. Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom, Inc. and Three River Telco.

² See In the Matter of Preserving the Open Internet and Broadband Industry Practices, GN Docket 09-191, WC Docket 07-52, Notice of Proposed Rulemaking, FCC 09-93 (rel. Oct. 22, 2009) (“Notice” or “NPRM”).

³ See *Policy Statement*, FCC 05-151 (rel. Sep. 23, 2005).

⁴ See Comments of the Nebraska Rural Independent Companies, WC Docket 07-52, (June 15, 2007) (hereinafter “NRIC Comments”), p.12.

laudable, the proposed rule set is subject to the inadequacies as explained in these comments. The Nebraska Companies believe that properly defining the key principles in the rules (*i.e.*, nondiscrimination, reasonable network management and transparency) is necessary to accomplish enforceable rules.

II. The Commission Should Incorporate a Definition of the Term “Nondiscrimination” into the Rules Which Specifically Identifies the Actions That Are Prohibited.

In the Notice, the Commission observes that high-level rules specifying impermissible practices will best promote an Internet environment of widespread innovation and light-handed regulation;⁵ however, the proposed nondiscrimination rule⁶ is overly broad and fails to enumerate those actions that are considered impermissibly discriminatory. Because the Commission’s codification of the nondiscrimination principle⁷ is an attempt to distinguish “socially beneficial discrimination from socially harmful discrimination,”⁸ the Nebraska Companies recommend that the Commission hone the language of proposed rule § 8.13 to facilitate the issuance of clear and unambiguous guidelines to broadband providers specifying conduct that constitutes “nondiscrimination.” In doing so, the first step for the Commission should be to revise proposed rule § 8.3 to incorporate a definition of “nondiscrimination” into the rules.

⁵ *Id.* at ¶ 49.

⁶ The text of proposed rule § 8.13 Nondiscrimination reads as follows:

Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.

⁷ In their July 16, 2007 reply comments, the Nebraska Companies recommended that the Commission add a principle of nondiscrimination to the Commission’s *Policy Statement*. See Reply Comments of the Nebraska Rural Independent Companies, WC Docket 07-52 (July 16, 2007) (hereinafter “NRIC Reply Comments”), p. 2.

⁸ NPRM at ¶ 103.

Although the Commission has expressed a preference for a case-by-case approach in making general nondiscrimination determinations,⁹ the Nebraska Companies urge the Commission to precisely define and describe the circumstances under which discrimination is strictly prohibited. The Nebraska Companies previously suggested language pertaining to nondiscrimination—namely, that *all entities that transport, route, or switch packets over the public Internet – including broadband Internet access service providers and Internet backbone providers – shall transport, route and/or switch all packets over the public Internet in a manner that does not discriminate based on the packets’ source, ownership, or destination.*¹⁰ To adequately define “nondiscrimination,” any proposed rule must clearly include prohibitions against discriminatory behavior related to pricing, access, content, device attachment, and applications on the *basis of affiliation.*¹¹

In the Notice, the Commission expresses an understanding of the term “nondiscriminatory” to mean that:

a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access [*i.e.*, enhanced or prioritized performance over the access link connecting a subscriber to the Internet] to the subscribers of the broadband Internet access service provider [...]¹²

The Nebraska Companies do not believe that the Commission’s articulated understanding of “nondiscriminatory” is comprehensive enough to properly, or precisely, define “nondiscrimination” in the context of the proposed rule set. While the Commission’s understanding illustrates an example of an economic “nondiscriminatory” practice, the Commission’s focus should be on discerning discriminatory actions that are harmful to the consumer. Consequently, the Commission’s proposed nondiscrimination rule must acknowledge

⁹ *Id.* at ¶ 110.

¹⁰ NRIC Comments, p 7.

¹¹ *Id.* at 7-8.

¹² NPRM at ¶ 106.

the increasing use by consumers of real-time Internet applications and accordingly, resist creating prohibitions on discrimination based upon the pricing and delivery of differentiated service levels.¹³ The Nebraska Companies advocate that discrimination relative to the pricing and delivery of differentiated service levels is necessary so that providers of broadband access to the Internet (particularly small carriers that have no market power) are not forced to incur extraordinary and unreasonable expenses to deal with network congestion, the cost of which would ultimately be borne by all users of the network.

The Nebraska Companies' initial comments in this proceeding also addressed the need for a prohibition on discrimination by affiliation,¹⁴ noting that large, vertically integrated corporations with a significant share of retail markets and large network footprints pose a significant threat to competition, consumers and ultimately, an open Internet. If the network provider is vertically integrated with the development or distribution of content, there is motivation for the provider to give preferential treatment to its own or affiliated content over independent content. Without proper prohibitions regarding discrimination by affiliation, a large footprint provider of broadband access to the Internet could block or degrade access to particular independent services such as Voice over the Internet.¹⁵ Even if there is not currently widespread evidence of the abuse of market power, there is no basis to preserve an opportunity for such abuses. Therefore, the Nebraska Companies urge the Commission to include in the definition of "nondiscrimination" a prohibition on discrimination based upon affiliation.

As a related example, the Commission has found that some Internet Service Providers (ISPs) were engaged in the blocking or degrading of Internet traffic, and doing so without

¹³ See NRIC Comments, p. 8.

¹⁴ *Id.* at p. 5.

¹⁵ *Id.*

disclosing their network management practices to users.¹⁶ Similarly, the Commission has provided examples of broadband Internet access service providers also serving as pay television operators.¹⁷ These providers could charge content providers or end users a higher fee to transmit or receive video programming over the Internet in order to protect the providers' own pay television service. Correspondingly, the same providers could seek to protect their own pay television service by degrading the performance of video programming offered and delivered over the Internet by third party providers. Thus, the Nebraska Companies encourage the Commission to specifically prohibit blocking or degradation of Internet content in the nondiscrimination rule.

The Nebraska Companies have illustrated various circumstances in which discriminatory treatment or degradation may occur if the nondiscrimination rule is not suitably definitive. Particularly, the nondiscrimination rule must explicitly specify that a broadband provider of Internet access cannot prevent or degrade a user's ability to access lawful content, applications or services. The Nebraska Companies urge the Commission to unambiguously define the term "nondiscrimination" by including language which prohibits the specific practices the Commission deems discriminatory.

III. The Commission Should Refine the Definition of "Reasonable Network Management" to Provide a Clear Understanding of Those Practices That Would Be Considered Presumptively Unreasonable.

Because the proposed rules regarding content, applications and services, devices, competitive options, nondiscrimination, and transparency are predicated on the concept of "reasonable

¹⁶ See, e.g., *Madison River Order*, 20 FCC Rcd 4295; *Comcast Network Management Practices Order*, 23 FCC Rcd 13028; Marcel Dischinger et al., *Detecting BitTorrent Blocking* (2008) (Dischinger, *Detecting BitTorrent Blocking*), http://www.mpi-sws.org/~mdischin/papers/08_imc_blocking.pdf.

¹⁷ NPRM at ¶ 72.

network management,”¹⁸ it is imperative that this term be clearly and unambiguously defined. The Nebraska Companies submit that the proposed definition of “reasonable network management” should provide a clear rule set of those practices that would be considered presumptively unreasonable.

While network management rules are important, the Nebraska Companies urge that reasonable practices mitigating the adverse effects of network congestion or addressing quality-of-service issues should not be prohibited. The Commission has already tentatively concluded that Internet access service providers may take reasonable steps to reduce or mitigate the adverse effects of congestion on their networks or to address quality-of-service concerns.¹⁹ The Nebraska Companies previously advocated²⁰ (and agree with those suggesting likewise) that it would be beneficial for a broadband Internet access service provider to protect the quality-of-service for those applications for which quality of service is important by implementing a network management practice of prioritizing classes of latency-sensitive traffic over classes of latency-insensitive traffic (such as prioritizing all VoIP, gaming, and streaming media traffic).²¹

The only economic means to ensure that a network can reliably support a wide range of multi-media applications is to deploy technologies that manage network flows. In the absence of infinite bandwidth and infinitesimal network delays, only a managed network can ensure that quality-of-service requirements of a particular network application can be fulfilled to a degree that meets ever-rising consumer expectations.²² Therefore, the Commission should limit its findings regarding “reasonable network management” practices to only those practices that the

¹⁸ *Id.* at ¶ 135.

¹⁹ *Id.* at ¶ 137.

²⁰ See NRIC Comments, pp. 8-9.

²¹ NPRM at ¶ 137.

²² See NRIC Comments, pp. 8-9.

Commission has investigated and determined that actually do not undermine the usefulness of the Internet to the public as a whole.

IV. The Commission Should Incorporate Universal Service Policy Considerations As Part of the Network Neutrality Discussion.

Previously, it has been argued that “network neutrality means that network owners will have the strongest incentives to respond to network demand by supplying more bandwidth, rather than with a strategy that involves discriminating between different kinds of content to manage scarcity.”²³ The Commission has recognized, however, that managing scarcity by simply increasing capacity would in some cases involve large costs, and revenue opportunities might not justify the required investment.²⁴ This outcome would be especially acute for companies serving rural markets with small populations and low densities which lack economies of scale and scope.²⁵

The Nebraska Companies emphasize that adopting network neutrality policies and rules for rural, high-cost areas must be done while also ensuring the universal service policies and funding needs are stable, sufficient, and sustainable. If such policies and rules require “investing one’s way out of congestion” by expanding capacity rather than reasonable and “granular” network management, the Commission must recognize the effect of such policy on the potential size of high-cost universal service fund and adjust the fund size in order to meet the national goal of ubiquitous and affordable broadband service. Until such time (and the Nebraska Companies submit that it appears unlikely that high-cost support will increase substantially), it is imperative that network neutrality policies recognize the fundamental differences in rural areas.

²³ See Free Press, “Making the National Broadband Plan Work for America,” December 2009, p. 12.

²⁴ NPRM at ¶ 80.

²⁵ See Phoenix Center Policy Bulletin No. 23, Expanding the Digital Divide: Network Management Regulations and the Size of Providers. Ford, George, Spiwak, Lawrence, and Stern, Michael, Phoenix Center for Advanced Legal & Economic Public Policy Studies (Oct. 2009).

V. The Commission Should Augment the Language of the Part 8 Proposed Rules to Include a Prohibition on Broadband Internet Access Service Providers Degrading a User's Internet Service Performance.

In considering the proposed rule regarding transparency, § 8.15,²⁶ the Nebraska Companies recommend that the Commission revise the language of this rule by striking the initial phrase “[s]ubject to reasonable network management.” Due to the fact that the directive contained in this section is not prohibitive of a particular network management activity on the part of the provider of broadband Internet access service, the language “subject to reasonable network management” is unnecessary. The purpose of this rule is to educate consumers about the protections afforded under the newly implemented Part 8 of Title 47 of the Code of Federal Regulations. Providers of broadband Internet access service would not have a reason to employ any network management practice in making this disclosure; thus, making this rule subject to such a requirement is unnecessary.

While the codification of the policy principles prohibits broadband Internet access service providers from preventing users from sending or receiving lawful content, running lawful applications or using lawful services of the user's choice, using or connecting the user's choice of lawful devices or depriving the user's entitlement to competitive options, the proposed rule fails to prohibit the broadband Internet access service providers from degrading a user's ability to do these things. For this reason, the Nebraska Companies believe that the language of the rules as a whole must be revised so that each applicable rule not only prohibits broadband Internet

²⁶ The text of proposed rule § 8.15 Transparency reads as follows:

Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application and service providers to enjoy the protections specified in this part.

service access providers from preventing users from engaging in the specified actions, but also precludes providers from degrading the user's service performance.

Furthermore, according to the language contained in both the Notice and the rule, it is unclear whether the disclosure requirement codified in this proposed rule applies to all network management practices a network provider may utilize, or only those practices that could degrade a user's Internet access service performance. The Nebraska Companies recommend that the Commission clarify the language of the proposed transparency rule so that broadband Internet access service providers are only required to disclose network management practices that may reasonably prevent, degrade or otherwise interfere with a user's Internet access service performance.

VI. Conclusion

In the Commission's efforts to successfully balance the interests and goals of broadband access to the Internet service providers, content and application providers and consumers, the Nebraska Companies believe that the language of the rules as a whole must be strengthened so that each applicable rule not only prohibits broadband Internet service access providers from preventing users from engaging in the specified actions, but also precludes providers from degrading the user's service performance.

Additionally, the Nebraska Companies urge the Commission to incorporate a definition of the term "nondiscrimination" into the proposed rules. The "nondiscrimination" definition should clearly prohibit discriminatory behavior related to lawful content, applications, services, device attachment, competitive options and on the basis of network affiliation; yet, permit broadband Internet access service providers to offer their users options for differentiated service levels in pricing and delivery. The Commission must also improve the definition of "reasonable

network management.” To clarify this definition, the Commission should specify in the proposed rule that practices that mitigate the adverse effects of network congestion and address quality-of-service issues, such as prioritization of latency-sensitive traffic, are not prohibited.

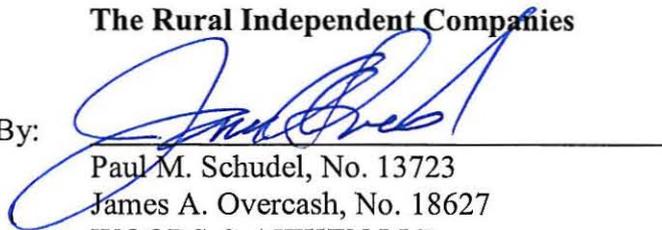
In regard to the proposed transparency rule, the Nebraska Companies suggest that providers of broadband Internet access service be required to disclose any network management practice in use by the provider that may reasonably prevent, degrade or otherwise interfere with a user’s ability to access lawful content, applications and services, utilize the user’s choice of lawful devices, or to select competition among network providers, application providers, service providers and content providers.

Finally, the Nebraska Companies emphasize that adopting network neutrality policies and rules for rural, high-cost areas must be done in a context that ensures the universal service policies and necessary funding sources are stable, sufficient, and sustainable to meet network neutrality goals.

Respectfully submitted,

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